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IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

NANCY WYMAN, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. We respectfully submit this *amicus curiae* brief in support of the Petition for one simple purpose: to alert the Court to the stake traditional

religious communities like ours have in the outcome of this case. [1]

For one thing, as petitioner correctly points out (Petition, at 26-28), the decision below may be cited as support for the all too common practice of certain states and state actors to exclude religious organizations, merely by virtue of their religious character, from participating in state employee charitable campaigns or gaining access to other public forums or programs – exclusions that are at tension with this Court's insistence on religious viewpoint neutrality in cases like *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Good News Club* v. *Milford School District*, 533 U.S. 98 (2001), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

For many religious organizations, however, the danger posed by the decision below is far more direct. Agudath Israel itself is a good example. The attitude of Orthodox Judaism toward homosexual conduct is fashioned by the biblical description of such conduct as "*to'eivah*," an abomination (*Leviticus* 20:13). Accordingly, to take an example most similar to the case of the Boy Scouts, the youth programs sponsored by Agudath Israel and its constituent congregations, as well as those sponsored by other Orthodox Jewish religious bodies, would regard a homosexual as an inappropriate role

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[1] Pursuant to Supreme Court Rule 37.3(a), we have obtained written consent from all parties to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for the amicus certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief.

We acknowledge and thank Simon Singer, a law student at Fordham Law School, for his assistance with this brief.

model for children, and would refuse to permit an openly gay person to serve as a youth leader.

In line with this position, Agudath Israel submitted an *amicus curiae* brief in support of the Boy Scouts' certiorari petition in the *Dale* case, urging the Court to accept the case for review, and to rule as it ultimately did: that the Boy Scouts' policy with respect to homosexual scout leaders was a constitutionally protected aspect of expressive association. (*Boy Scouts of America* v. *Dale,* No. 99-699, Brief of Agudath Israel of America as Amicus Curiae in Support of the Petition, Nov. 26, 1999.) We pointed out (at 2-4) that, absent such protection, traditional religious communities like ours would be extremely vulnerable to discrimination claims similar to that asserted by Mr. Dale against the Boy Scouts – because, in the aftermath of *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), the Free Exercise clause offers little if any comfort to any religious body whose faith demands that it engage in conduct deemed to be unlawful discrimination under generally applicable provisions of secular law; and because many state and local anti-discrimination laws carve out no exemptions, or extremely limited exemptions, for religious entities whose tenets may occasionally require such discrimination.[2]

Happily, from our perspective, the Court in *Dale* found that the Boy Scouts' policy regarding homosexual leaders enjoyed constitutional protection. *Boy Scouts of America* v. *Dale,* 530 U.S. 640 (2000). Following the Court's ruling, however, the Boy Scouts encountered a significant backlash

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[2] The *amicus* brief of The Beckett Fund for Religious Liberty, et al. in the instant case catalogues, in fairly comprehensive detail, the varying approaches of the states to the issue of religious exemptions from state antidiscrimination laws. Brief Amicus Curiae of The Beckett Fund for Religious Liberty, et al. in Support of Petitioners, Boy Scouts of America v. Wyman, February 5, 2004, at 4-6.

and were treated, in the words of columnist Nat Hentoff, "like pariahs around the county." Hentoff, "Cut Americas's Boy Scouts a Break", *Washington Times* (June 18, 2001). One manifestation of that backlash was a series of governmental actions, like the one at issue in this case, that sought to penalize the Boy Scouts for their policy by excluding them from certain privileges and benefits generally available to other chartable and non-profit entities.

Nor have the Boy Scouts been the only ones targeted for opprobrium for their stance on homosexuality; so too have traditional religious communities like ours. The *New York Sun*, in an editorial shortly after the Massachusetts Supreme Court's same-sex marriage ruling in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), took note of "the fact that, with a few exceptions, this cause is being advanced through the denigration of Jews and Christians who adhere to the fundamentals of religious law." The editorial gave us at Agudah Israel particular cause for anguish:

> "Why, a friend asked us several months ago, has The New York Sun failed to take an editorial stand on the question of gay marriage? Our friend, a decent and exceptionally well-educated person, was perplexed, he said, because he was aware that we welcome gay and lesbian individuals and couples into our workplace, homes, friendships, and families. We responded to his question by asking him what he would do about the Agudath Israel and its Council of Torah Sages. 'I see them as bigots,' replied our friend, 'just like any other religious fundamentalists.'"

Editorial, "'Simply About Prejudice'", *New York Sun* (Nov. 24, 2003).

The *Sun*'s friend echoed a sentiment that is finding increasingly aggressive expression in American society. Consider, for example, the text of an ad that appeared on the September 1, 1998 op-ed page of *The New York Times* and elsewhere:

> LET ME ASK YOU SOMETHING...
> SINCE WHEN IS BIGOTRY A MORAL VIRTUE?
>
> Back in 1906, a leading American theologian published a best-selling book justifying discrimination against African Americans, saying they were creatures of uncontrollable "sensuality." Similar racist theories were spouted by politicians like the notorious "Pitchfork" Ben Tillman who toured the country under the banner, "Negro equality in politics means social equality, mongrelization, hellfire and damnation!" Belief in the innate immorality of black people, buttressed by selected scriptural references, formed the basis for slavery, segregation and lynchings.
>
> Now come the homophobes, spouting the same hate-filled rhetoric about a different minority group. "Homosexuality is immoral, unscriptural and unhealthy," we are told. It is a "sin", like theft and drunkenness, according to Senate Majority Leader Trent Lott. The Pitchfork Tillmans of today warn that the "homosexual lobby" wants to bring about the destruction of the American family. Just like their racist antecedents, they are trying to whip up hatred and intolerance in order to build public support for anti-gay laws.
>
> Sure, they can try to hide behind morality, but we all know a bigot when we see one. Think about it.
>
> Ira Glasser
> Executive Director of the American Civil Liberties Union

In line with its depiction of religious traditionalists who regard homosexuality as sinful or immoral as hate-filled bigots, the ACLU took a lead role in torpedoing the 1999 Religious Liberty Protection Act (a bill designed to restore free exercise

protection in a manner consistent with the Court's decision in *City of Boerne*, *supra*), on the theory that the protections of the bill should not extend to conflicts that may arise between civil rights and religious practice. *See* Jacobson, "A Coalition with a Liberal-Leave Policy," *National Journal* (Oct. 30, 1999); Bernstein, "Liberties vs. Anti-Bias Laws," *Washington Times* (Aug. 15, 1999). For the ACLU and its cohorts, religious freedom is a fine slogan, but it must take a legal and social back seat to the egalitarian dictates of modern day society.

We now renew our plea to the Court to accept this case for review as well, and to reverse the Second Circuit's decision that Connecticut may constitutionally disqualify the Boy Scouts from the state's workplace charitable campaign. If governmental entities are free to impose such penalties on an organization like the Boy Scouts – or other penalties, like the ones at issue in *Barnes-Wallace* v. *Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (withdrawal of city campgrounds lease), *Boy Scouts of America* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (barring after-hours use of public school facilities), and *Evans* v. *City of Berkeley,* 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (exclusion from boat-berthing privileges at City marina); or perhaps even more severe penalties such as withdrawal of tax exempt status, as intimated by Judge Calabresi in the Second Circuit below, 335 F.3d at 92 n.5 – then presumably they are free to impose similar penalties on religious organizations that have similar policies, at least where those policies are not expressly permitted by statutory exemption.

Indeed, while this case, like *Dale,* does not directly involve a religious institution, if the Second Circuit's decision is allowed to stand, its main impact may well be felt in traditional faith communities and organizations like ours. For, as we wrote in our *Dale* brief (at page 6):

> "[I]f current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual conduct. Religious denominations like Orthodox Judaism, though – and the numerous other faith groups across this nation that do not regard *Leviticus* as irrelevant – are likely to remain stubborn holdouts. Our stake in an America that allows orthodox faiths to dissent from secular orthodoxies of the day is substantial and enduring, and leads us to raise our voice in support of the Boy Scouts' petition."

ARGUMENT

The petitioner's brief amply demonstrates that the decision below departs from this Court's established precedent and conflicts with decisions of other lower courts. At this point, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, we simply adopt petitioner's argument as our own.

CONCLUSION

This case makes clear that the remarkable legal gains made by the homosexual community in recent years – whatever one may think of those gains – are by no means a "zero sum game"; they exact a heavy toll on those who dare to still adhere to the traditional view on homosexuality. In *Lawrence* v. *Texas,* 123 S. Ct. 2472, 2480 (2003), the Court described that traditional view:

> "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of rights and acceptable behavior, and respect for the traditional family. For many persons

these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."

The question this case raises is whether organizations and communities that adhere to those convictions may be treated as legal pariahs, Pitchfork Tillman bigots to be demonized and ostracized from the rest of civilized society through the type of penalty imposed by Connecticut on the Boy Scouts. For the reasons set forth in the Boy Scouts' petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges the Court to grant the petition, accept certiorari, and reverse the decision below.

Respectfully submitted,

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